Ahad @ Raman bin Sarudin & Ors (suing on behalf of themselves, their family members and claimants of Native Customary Rights (NCR) situated at or around Padang Kerbau, and all of Kampung Haji Wahed (Lereng Bukit), Kampung Pujut Tanjong Batu/Padang Kerbau, and Kampung Katong/Lopeng, 98000 Miri, Sarawak) v Pantai Bayu Indah Sdn Bhd & Anor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS Q-01(IM)(NCVC)-181–05 OF 2016 AND Q-01(IM)(NCVC)-182–05 OF 2016
TENGKU MAIMUN, ZALEHA YUSOF AND ABDUL KARIM JJCA
13 DECEMBER 2018

Civil Procedure — Striking out — Statement of claim — High Court struck out appellants' claim on ground it was barred under various provisions of the law and did not raise any issue of fraud to challenge the indefeasible land title and rights of the respondents — Whether appellants' claim obviously unsustainable and had no chance of success at trial — Whether High Court right to strike out claim

On 13 June 1997, the Sarawak Government through the Superintendent of Land and Survey, Miri Division ('the superintendent'), alienated a parcel of land ('the land') to Pantai Bayu Indah Sdn Bhd ('Pantai Bayu'). The land was subsequently subdivided into lots — some of which were eventually jointly owned by Pantai Bayu and Woodman Golf Course Bhd ('the respondents') — and, over a course of nine years, underwent massive development including the construction of the Miri By-Pass Road, a golf course and resort and an industrial park. In late 2014, many years after all these development projects had taken place, the appellants, who were natives of Sarawak, brought an action, on behalf of themselves, their family members and other claimants, alleging that their native customary rights ('NCR') in the land had been infringed. The appellants claimed that they, their ancestors and their livestock had traditionally lived off the land for sustenance but this came to an end with the 'unlawful, unconstitutional and void' alienation of the land to the respondents who committed 'trespass and nuisance' by carrying out the massive development projects on the land. The appellants claimed that they were never compensated and therefore their NCR in the land remained unaffected. The appellants sought damages and various declaratory reliefs including cancellation of the land alienation. All the defendants sued by the appellants applied to strike out the appellants' claim on the ground that it was statute-barred under various provisions of the law and also for the reason that the respondents and acquired indefeasible rights, title and interest in the

land/the subdivided lots free of any NCR claim. With respect to their delay in seeking relief, the appellants claimed they were initially unaware of the development projects that were taking place on the land. They also claimed that no limitation period was applicable because their NCR claim was never extinguished. The High Court allowed the striking-out applications holding that, inter alia, that: (a) the appellants were at all times aware of the development works that were taking place on the land; (b) their claim was defeated by various provisions under the Sarawak Limitation Ordinance ('the SLO'), the Sarawak Land Code and the Public Authorities Protection Act 1948; and (c) the rights, title and interests the respondents had acquired to the subdivided plots of the land were indefeasible and unencumbered in the absence of any allegation of fraud raised by the appellants. The instant appeal was against the High Court's decision.

Held, unanimously dismissing the appeal:

(1) Having regard to the relevant provisions in the SLO and the Land Code and case laws, the High Court was plainly not wrong in deciding that this was a fit and proper case to exercise its discretion to strike out the appellants' claim. In the light of Items 72, 97, 110 and 112 of the Schedule to the SLO, the High Court was right to find that the appellants' claim was barred by limitation. As such, the claim was obviously unsustainable (see para 44).

(2) There was no reason to depart from the findings of fact made by the High Court based on the appellants' pleading and affidavits including the fact that the appellants were aware of the developments that were taking place on the land between 1997 and 2006 and, by extension, the alleged infringement of their NCR. There were no 'massive disputed facts' in the case as was alleged by the appellants (see paras 27–28 & 43).

(3) The appellants' NCR was extinguished on 13 June 1997 when the land was alienated to Pantai Bayu Indah Sdn Bhd and the limitation period started from that date. Alternatively, the cause of action accrued when the appellants were dispossessed of the claimed land when the construction of the Miri By-Pass Road began in 1997. By reason of Items 110 and 112, the claim was time barred by 2009 (see para 35).

(4) On the appellants' contention that their claim was in respect of a continuing wrong and that by s 23 of the SLO, a fresh period of limitation began to run every moment the breach or wrong continued, the answer lay in the appellants' conduct and that whatever injury that was caused to the appellants was caused by a single act of the superintendent in issuing the provisional lease and/or the single act of the respondents in undertaking development projects on the land. In any event, the appellants could not have been in possession of the land given the massive developments/projects that had taken place thereon. The

claims for nuisance and trespass, an injury to a possessory right, were therefore not sustainable (see paras 38–39).

[Bahasa Malaysia summary

Pada 13 Jun 1997, Kerajaan Sarawak melalui Superintenden Tanah dan Survei, Daerah Miri ('superintenden'), telah menyerahhak sebidang tanah ('tanah tersebut') kepada Pantai Bayu Indah Sdn Bhd ('Pantai Bayu'). Tanah tersebut kemudian telah dibahagikan kepada beberapa lot — yang sebahagiannya telah domiliki bersama oleh Pantai Bayu dan Woodman Golf Course Bhd ('secara kolektif dikenali sebagai 'responden-responden') — dan, sepanjang sembilan tahun, telah mengalami pembangunan pesat termasuk pembinaan Jalan Pintas Miri, padang golf dan pusat peranginan dan taman perindustrian. Di penghujung 2014, beberapa tahun selepas semua projek pembangunan tersebut telah berlaku, perayu-perayu, yang merupakan anak watan Sarawak, telah memulakan tindakan, bagi pihak mereka, ahli keluarga dan penuntut-penuntut lain, mengatakan bahawa hak adat anak watan mereka ('HAAW') ke atas tanah tersebut telah dilanggari. Perayu-perayu mendakwa bahawa mereka tidak diberi pampasan dan oleh itu HAAW mereka ke atas tanah tersebut masih tidak terjejas. Perayu-perayu memohon ganti rugi dan pelbagai relif deklaratori termasuk pembatalan penyerahhakan tanah. Kesemua defendan yang disaman oleh perayu-perayu telah memohon untuk membatalkan tuntutan perayu-perayu atas alasan bahawa ia luput had masa di bawaha pelbagai peruntukan undang-undang dan juga oleh sebab responden-responden dan hak, hak milik dan lepentingan tak disangkal yang diperoleh ke atas tanah tersebut/lot-lot yang dibahagikan itu bebas daripada apa-apa tuntutan HAAW. Berdasarkan kelewatan mereka memohon relif, perayu-perayu mendakwa mereka pada awalnya tidak menyedari tentang projek-projek pembangunan yang berlaku ke atas tanah tersebut. Mereka juga mendakwa bahawa tiada had masa terpakai kerana tuntutan HAAW mereka tidak lupus. Mahkamah Tinggi membenarkan permohonan-permohonan pembatalan itu dengan memutuskan bahawa, antara lain: (a) perayu-perayu adalah pada setiap masa menyedari kerja-kerja pembangunan yang sedang dijalankan ke atas tanah tersebut; (b) tuntutan mereka gagal oleh sebab beberapa peruntukan di bawah Sarawak Limitation Ordinance ('the SLO'), Sarawak Land Code dan Public Authorities Protection Act 1948; dan (c) hak, hak milik dan kepentingan responden-responden perolehi untuk membahagikan plot tanah tersebut tidak disangkal dan tiada sekatan dengan ketiadaan apa-apa dakwaan fraud yang ditimbulkan oleh perayu-perayu. Rayuan ini adalah terhadap keputusan Mahkamah Tinggi.

Diputuskan, sebulat suara menolak rayuan:

(1) Berdasarkan peruntukan-peruntukan relevan dalam SLO dan Sarawak Land Code dan kes undang-undang, Mahkamah Tinggi jelas tidak salah dalam memutuskan bahawa ini adalah kes yang sesuai dan wajar untuk

menggunakan budi bicaranya untuk membatalkan tuntutan perayu-perayu. Berdasarkan Item 72, 97, 110 dan 112 dalam Jadual kepada SLO, Mahkamah Tinggi adalah betul kerana mendapati bahawa tuntutan perayu-perayu telah luput had masa. Oleh itu, tuntutan itu jelas tidak boleh kekal (lihat perenggan 44).

(2) Tiada sebab untuk beralih daripada penemuan fakta yang dibuat oleh Mahkamah Tinggi berdasarkan pliding dan afidavit perayu-perayu termasuk fakta bahawa perayu-perayu menyedari tentang pembangunan yang berlaku ke atas tanah tersebut antara 1997 dan 2006 dan, melalui lanjutan, pelanggaran yang dikatakan terhadap HAAW mereka. Tiada 'massive disputed facts' dalam kes sebagaimana didakwa oleh perayu-perayu (lihat perenggan 27–28 & 43).

(3) HAAW perayu-perayu telah lupus pada 13 Jun 1997 apabila tanah tersebut diserahhak kepada Pantai Bayu Indah Sdn Bhd dan tempoh had masa bermula dari tarikh tersebut. Secara alternatif, kausa tindakan terakru apabila perayu-perayu tidak memiliki tanah yang dituntut apabila pembinaan Jalan Pintas Miri bermula pada 1997. Oleh sebab Item 110 dan 112, tuntutan telah luput had masa menjelang 2009 (lihat perenggan 35).

(4) Berdasarkan hujah perayu-perayu bahawa tuntutan mereka berkaitan kesalahan berterusan dan oleh sebab s 23 SLO, tempoh had masa baharu bermula setiap kali pelanggaran atau kesalahan berterusan, jawapannya terletak pada perbuatan perayu-perayu dan bahawa apa pun kerugian yang disebabkan oleh satu tindakan superintendan yang mengeluarkan pajakan provisional dan/atau satu tindakan responden-responden menjalankan projek-projek pembangunan ke atas tanah tersebut. Dalam apa keadaan, perayu-perayu tidak mungkin memiliki tanah tersebut berdasarkan pembangunan pesat/projek-projek yang telah berlaku. Tuntutan kacau ganggu dan pencerobohan, kerugian kepada hak pemilikan, dengan itu tidak dapat dikekalkan (lihat perenggan 38–39).]

Notes

For cases on statement of claim, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 9458–9521.

Cases referred to

Abdul Samad bin Mohd Embong & Ors v Pantai Bayu Indah Sdn Bhd & Ors [2017] MLJU 2344, HC (refd)

Director of Forests, Sarawak & Anor v Racha ak Urud @ Peter Racha Urud & Ors and other appeals [2017] 4 MLJ 42; [2017] 1 LNS 376, FC (refd)

Husli @ Husly bin Mok (suing as administrator of the estate of Mok bin Tuan, deceased) v Superintendent of Lands & Surveys & Anor [2014] 6 MLJ 766, FC (folld)

Litus Jau & Anor v Boustead Pelita Tinjar Sdn Bhd & Ors [2014] 1 MLJ 794; [2014] 1 CLJ 880, CA (folld)
Racha ak Urud @ Peter Racha Urud & Ors v Ravenscourt Sdn Bhd & Ors [2012] MLJU 96; [2012] 1 LNS 92, HC (refd)
Racha ak Urud @ Peter Racha Urud & Ors v Ravenscourt Sdn Bhd & Ors [2014] 3 MLJ 661; [2014] 4 CLJ 393, CA (refd)
Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong) [2008] 2 MLJ 677; [2007] 6 CLJ 509, FC (distd)

Legislation referred to

Land Code (Cap 81) s 15 ss 23, 112, 132(1), 202
Public Authorities Protection Act 1948 s 2, 2(a)
Rules of Court 2012 O 18 r 19(1)
Rules of the High Court 1980 O 14A, O 18 r 19, O 33 r 2, O 53
Sarawak Limitation Ordinance s 23, Schedule, Items 72, 97, 110, 112, 113

Appeal from: Suit No Myy-21NCVC-8/12 of 2014(HC) (High Court, Miri)

Dominique Ng Kim Ho (Dominique Ng & Assoc) for the appellants.
Sim Hui Chuang (Lip Sze with him) (Reddi & Co) for the respondents.

Tengku Maimun JCA (delivering judgment of the court):

INTRODUCTION

[1] These two appeals emanated from the decision of the High Court in striking out the appellants' ('the plaintiffs') claim pursuant to two separate applications under O 18 r 19(1) of the Rules of Court 2012 ('the ROC') filed by the first and the second respondents ('the first and the second defendants') and the third and the fourth respondents ('the third and the fourth defendants').

BACKGROUND FACTS

[2] On 13 June 1997, the third and the fourth defendants alienated all that parcel of land described as Lot 2025, Kuala Baram Land District ('Lot 2025') to the first defendant by way of a provisional lease. Pursuant to of the Sarawak Land Code ('the Land Code') and by entry in the register kept under s 112 of the Land Code, the first defendant accordingly became the registered proprietor of Lot 2025.

[3] Lot 2025 was sub-divided and three of the sub-divided lots are Lot 749, Lot 786 and Lot 788, all of Block 17, Kuala Baram Land District. The

documents of title, leases of the state land for Lots 749, 786 and 788 were issued on 2 July 2002 with the first defendant as the registered proprietor. The first and the second defendants are now the registered co-proprietors of Lots 786 and 788 while the first defendant remains the registered proprietor of Lot 749 (see para 11 of the affidavit in support of encl 19).

[4] The first and the second defendants had undertaken various developments, constructions and other works in respect of Lot 2025 and/or the mutated or sub-divided lots thereof.

[5] In 1997, the construction of the Miri By-Pass Road began which was completed sometime in end of 2002. The Miri By-Pass Road had been used by the public since its completion.

[6] In 2003, works commenced on the construction and development of a golf course and resort known as the Eastwood Valley Golf and Country Club on Lots 786 and 788. The stages of construction in 2004 until 2006 were evident from the photographs at exh TKC7 to encl 19. The photographs taken in March 2006, in particular showed that the project is fully completed and since then, the Eastwood Valley Golf and Country Club has been in continuous operation.

[7] In 2006, the development of Lot 1373 as an Industrial Park, commenced. Lot 1373 is a subdivided part of Lot 788. Since completion in 2009, 451 units of the Industrial Park were sold and there were also several transactions of sub-sale and leases.

PROCEEDINGS IN THE HIGH COURT

[8] On 1 December 2014, some 17 years after works on Miri By-Pass, 11 years after the works of the Eastwood Valley Golf and Country Club and eight years after the development of the Industrial Park had commenced, the plaintiffs, the natives of Sarawak, on their own behalf and on behalf of their family members and claimants of native customary rights ('NCR') brought an action against the defendants in the High Court at Sabah and Sarawak at Miri.

[9] It was the plaintiffs' case that at all material times, they, together with their family members, relatives and other fellow villagers are the original title holders or permit holders of all that area situated at or around Padang Kerbau and all of Kampong Hj Wahed (Lereng Bukit), Kampong Pujut Tanjong Batu/Padang Kerbau and Kampong Katong, Miri Sarawak and part of which are within the disputed area which are described as Lots 749, 786 and 788, Block 17 of Baram Land District and also Lot 1480 Block 17 Kuala Baram Land District ('the said land').

[10] Vide para 17 of the amended statement of claim, the plaintiffs pleaded that in or about 2001–2002, the first defendant had brought numerous workers onto the plaintiffs' said land and started clearing and in the process, had destroyed the plaintiffs' or their relatives' houses, land, gardens, trees and crops and the fields and grazing and roaming areas of the *kerbau*; that the first defendant had built and sold shop houses or commercial building on parts of the plaintiffs' land and that the fifth defendant (not a party before us) had built a petrol station on Lot 1480 Block 17, Kuala Baram Land District, which had been in operation for a number of years.

[11] Vide para 23, the plaintiffs pleaded that the first and the second defendants had wrongfully trespassed and are still continuing to wrongfully trespass onto and/or unlawfully occupying the plaintiffs' land. And that by reasons described above, the first and the second defendants had also committed nuisance.

[12] As against the third and the fourth defendants, the Superintendent of Land and Survey Miri Division and the State Government of Sarawak respectively, the plaintiffs pleaded that the alienation of the land by the third defendant is unlawful, unconstitutional and null and void as there was no extinguishment of the plaintiffs' NCR within the land covered by the provisional lease issued to the first and the second defendants and that there was no provision as to compensation made or paid to the plaintiffs. The plaintiffs claimed inter alia for various declaratory reliefs, asserting NCR and ownership of the land; for an order directing the third defendant to cancel the said provisional lease(s) and for damages.

[13] Vide encl 19, the first and the second defendants applied to strike out the plaintiffs' claim under O 18 r 19(1) of the ROC and under the inherent jurisdiction of the court. The application was premised on two grounds, namely that the plaintiffs' claim was statute barred and that the first and the second defendants' rights, title and interest as registered proprietors of Lots 749, 786 and 788 are indefeasible and free of the plaintiffs' alleged NCR claim.

[14] The third and the fourth defendants vide encl 21 likewise applied to strike out the plaintiffs' claim. In support of their application, the third and the fourth defendants raised the following questions:

(a) whether the plaintiffs' claims and reliefs sought against the third and fourth defendants are barred by reason of the Sarawak Limitation Ordinance ('SLO') and/or s 2 of the Public Authorities Protection Act 1948 ('the PAPA');

(b) whether the plaintiffs' claim for damages is barred by virtue of s 202 of

A the Land Code; and

(c) whether having regard to the fact that the plaintiffs' rights (if any) over the said land were lost by the issuance of the provisional lease to the other defendants, and whether the plaintiffs' claim for declarations (a discretionary remedy) ought to be granted by the court given that the action was only commenced by the plaintiffs in 2014.

[15] The plaintiffs contended that while the title of Lot 2025 may have been issued in 1997 and that there were some sub-divisions of the land, the plaintiffs had no knowledge of the development works/projects. The plaintiffs also claimed that there was a continuing wrong committed by the defendants and that the plaintiffs are entitled to rely on s 23 of the SLO. It was further contended that the limitation period commences only upon the extinguishment of the NCR and as there had been no extinguishment of NCR, limitation period has not begun to run.

FINDINGS OF THE HIGH COURT

[16] The learned judge decided both applications in favour of the defendants. In respect of encl 19, the findings of the learned judge may be summarised as follows:

(a) the plaintiffs were fully aware that since 1997 when Lot 2025 was alienated, various construction works were undertaken on Lot 2025 and the sub-divided and/or mutated lots;

(b) the time limit for the plaintiffs to seek the cancellation or setting aside of Lots 749, 786 and 788 is three years from 2 July 2002 when the documents of title for the said Lots were issued;

(c) the time limit of three years under Item 72 of the Schedule to the SLO expired in 2005;

(d) the plaintiffs' claim in respect of the alleged NCR land or possession thereof was also caught by limitation under Item 110 and 112 of the Schedule to the SLO;

(e) in the event Items 72, 110 and 112 of the Schedule to the SLO do not apply, Item 97 which prescribes the limitation period of six years would apply;

(f) the first and the second defendants' rights, title and interest in Lots 749, 786 and 788 are indefeasible and free of the plaintiffs' alleged claim of NCR; and

(g) the plaintiffs' reliance on s 23 of the SLO was misconceived and without merits.

[17] In respect of the third and the fourth defendants, the learned judge also found that the plaintiffs' action was time barred under s 2 of the PAPA; that the plaintiffs' action against the third and the fourth defendants was to recover compensation or damages and that by s 202 of the Land Code, the plaintiffs' action is also barred by limitation.

[18] Dissatisfied with the decision of the learned judge, the plaintiffs appealed to this court. We had unanimously dismissed the appeal. We now furnish our full reasons.

THE APPEAL

[19] For brevity, we do not propose to set out the submissions of the parties. Suffice to state that before us, learned counsel for the appellants/plaintiffs submitted that the instant case is not a plain and obvious case for striking out as there are 'massive disputed facts' and that the questions of law posed do not favour the defendants.

[20] Essentially it was argued for the plaintiffs that NCR is a constitutional right and as such it is not subject to limitation provisions which deal with personal rights and which are applicable to contract, tort or trust. For this proposition, learned counsel relied on the decision of this court in *Racha ak Urud @ Peter Racha Urud & Ors v Ravenscourt Sdn Bhd & Ors* [2014] 3 MLJ 661; [2014] 4 CLJ 393. Although the decision of this court was overturned by the Federal Court (see *Director of Forests, Sarawak & Anor v Racha ak Urud @ Peter Racha Urud & Ors and other appeals* [2017] 4 MLJ 42; [2017] 1 LNS 376), learned counsel for the plaintiffs submitted that the Federal Court did not address or answer the issue of limitation. Hence, the decision of this court on limitation should be followed.

[21] Learned counsel for the plaintiffs also relied on *Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong)* [2008] 2 MLJ 677; [2007] 6 CLJ 509 in support of his submission that in the absence of a specific extinguishment of the plaintiffs' pre-existing NCR, the first and the second defendants do not have indefeasibility of title over the said land.

OUR DECISION

[22] It is trite that this court will only interfere in the decision of the High Court if the learned judge is plainly wrong in his decision.

[23] In allowing the applications in encls 19 and 21, the learned judge found that the plaintiffs' claim was barred by limitation by reason of Items 72, 97, 110

A and/or 112 of the Schedule to the SLO.

[24] Under Item 72, the time period to commence an action 'to cancel or set aside an instrument not otherwise provided for' is three years from when the facts entitling the plaintiffs to have the instrument cancelled or set aside become known to them. Item 97 provides for a suit for which no period of limitation is provided elsewhere in the Schedule.

[25] Item 110 stipulates that for possession of immoveable property, when the plaintiff, while in possession of the property, has been dispossessed or had discontinued the possession, the limitation period is twelve years from the date of dispossession or discontinuance of possession. The limitation period is similarly twelve years under Item 112 for possession of immoveable property or any interest therein not otherwise specially provided for, and time begins to run from the date when possession of the defendant becomes adverse to the plaintiff.

[26] The learned judge noted that the plaintiffs admitted that they knew about the construction of the Miri By-Pass Road which commenced in 1997 and completed in 2002. The learned judge further noted that the Miri By-Pass Road was a very major construction which ran for more than eight kilometers and cut right across the area allegedly claimed by the plaintiffs. We agreed with the learned judge, given the plaintiffs' affidavit in opposition which states, inter alia, that:

> ... The Plaintiffs are aware of the said developments in so far as they are long expected government projects and which are always the responsibility of the government of the day as such. There were no signs or any indications at all that it was a private project of the 1st and the 2nd Defendants.

[27] In our view, whether or not the project was undertaken by the government of the day or by private parties, the fact remains that the plaintiffs knew about the development and by extension, the alleged infringement of their NCR. To reiterate, the plaintiffs sought among others that the provisional lease be cancelled. This relief fell squarely under Item 72 and for purposes of limitation under Item 72, it is the knowledge of the fact that the plaintiffs' alleged NCR land had been infringed that determines the period of limitation.

[28] Further, even though the plaintiffs denied knowledge of the construction and development of the Eastwood Valley Golf and Country Club and the Industrial Park, the learned judge dismissed such denial as His Lordship found that it was simply not credible for the plaintiffs not to know that such a huge and major Golf Course and Country Club and the Industrial Park were being constructed and completed at the area claimed by them, as the development covered a large area and involved a substantial construction

activities which would have caught the plaintiffs' attention. We found no reason to depart from the findings of the learned judge.

[29] In deciding against the plaintiffs, the learned judge relied on the relevant provisions of the SLO and the Land Code and the decision of this court in *Litus Jau & Anor v Boustead Pelita Tinjar Sdn Bhd & Ors* [2014] 1 MLJ 794; [2014] 1 CLJ 880 and the decision of the Federal Court in *Husli @ Husly bin Mok (suing as administrator of the estate of Mok bin Tuan, deceased) v Superintendent of Lands & Surveys & Anor* [2014] 6 MLJ 766.

[30] Learned counsel for the plaintiffs submitted that *Litus Jau* and *Husli bin Mok* are not applicable to the instant case. We disagreed.

[31] In *Litus Jau*, the appellants/plaintiffs claimed that they had acquired NCR over certain parcels of land. The complaint was that the second defendant, the Superintendent of Lands and Surveys Miri Division and the third defendant, the state government had alienated and issued a provisional lease over a part of their NCR land to the first defendant without their knowledge. In the High Court, the defendants filed an application to strike out the plaintiffs' action and thereafter, filed an application under O 14A of the Rules of the High Court 1980 ('the RHC') to decide on certain questions of law and in the event the said questions were determined in favour of the defendants, the plaintiffs' action would be struck out under O 18 r 19 of the RHC.

[32] The High Court decided, inter alia, that the plaintiffs should have proceeded by way of judicial review under O 53 of the RHC instead of a writ action and that the action filed by the plaintiff in 2011 was barred due to the SLO and s 2(a) of the PAPA. The plaintiffs' action was then struck out. Aggrieved by the said decision, the plaintiffs appealed to this court. The plaintiffs' appeal was dismissed. In dealing with the issue of limitation, Raus Sharif PCA (as he then was) said:

> [33] ... The issue now is when the plaintiffs' cause of action accrued. Looking at the facts objectively it is safe to conclude that the plaintiffs' cause of action against the second and third defendants accrued after the issuance of the provisional lease in 1992. Given this scenario and premised on the thirty six months limitation provided under s 2(a) of PAPA, there can be no doubt that the plaintiffs' action against the second and the third defendants is time barred as the suit was brought nearly twenty years after the issuance of the provisional lease which is beyond the statutory timeline permitted.
>
> [34] However on a different note, assuming there was indeed continuous injury and damage as the plaintiffs allege, can the plaintiffs rely on the second limb of s 2(a) to defeat the issue of limitation? The way we perceive it, the answer to this question lies in the conduct of the plaintiffs on this matter. In this regard, it is undisputed that the

plaintiffs took nearly twenty years to bring this action. This clearly shows that if they had any rights indeed, which had been infringed, and as a result thereof they have continued to suffer, an action should have been commenced promptly. However, the facts of this case certainly does not support the existence of a continuing injury or damage as whatever injury was caused by a single act of the second defendant in issuing the provisional lease some 20 years ago. During this time the first defendant managed to complete their oil palm plantation, and there were two compulsory land acquisition on two different occasions. The plaintiffs did not challenge these acquisition. As such the irresistible conclusion that can be drawn from this factual scenario is that whatever rights the plaintiffs have had been defeated as they had slept over it or acquiesced to the infringement of their rights. As rightfully pointed out by learned counsel for the second and third defendants since the plaintiffs did not take any action to protect their purported rights, it raises serious doubts on the bona fide of their NCR claim. Thus, in our judgment, having taken into account the facts and circumstances of the instance case, we find that the plaintiffs' claim against the second and third defendants is hereby caught by limitation under s 2(a) of PAPA.

[35] Insofar as the first defendant was concerned, as we have alluded to in the earlier part of this judgment, the limitation period provided for under Item 97 of the SLO is six years. In this regard based on Item 97 of the SLO, we find that the plaintiffs' action which was instituted in year 2011 nearly eighteen years after the first defendant had finished the oil palm plantation is clearly out of time.

[36] In the same way, learned counsel for the first defendant also submitted that the plaintiffs' writ action filed against them in 2011 was barred by limitation by reasons as envisaged under Items 72, 110, 112 of the SLO. ...

[37] Premised on the above, learned counsel for the first defendant submitted that the claim instituted by the plaintiffs is time barred under the aforesaid Items of the SLO. We have no hesitation in agreeing with the first defendant's contention on this point. Clearly, even looking at the other Items under the SLO which is consonant with the issue of limitation and which is applicable to the instant case, we can safely conclude that the plaintiffs' action herein against the first defendant is also statute barred.

[33] In *Husli bin Mok*, the appellant/plaintiff, the administrator of the estate of Mok bin Tuah ('the deceased') claimed that a certain parcel of land was the NCR land of the deceased. The land subsequently formed part of the estate of the deceased and devolved upon the plaintiff and his siblings as beneficiaries thereof. It was the plaintiff's case that sometime in 1987, the land was alienated by the respondents/defendants to Sarawak Econominc Development Corp ('SEDC') without extinguishment of the plaintiff's NCR over the land and without payment of compensation in contravention of the provisions of s 15 of the Land Code.

[34] The defendants raised a preliminary issue of law based on limitation under O 33 r 2 of the RHC. Upon determination of the preliminary issue, the

High Court struck out the plaintiff's action. The decision of the High Court was affirmed by this court where this court took the view that the question for determination revolved around the construction of s 202 of the Land Code, particularly as to the three-year limitation period prescribed therein. The plaintiff obtained leave to appeal to the Federal Court. The first question of law posed for determination by the Federal Court was whether the provisions of s 202 of the Land Code applies to bar a claim for compensation for alleged loss of NCR over land resulting from the alienation (without extinguishment of the NCR) of such state land to another party. Speaking for the Federal Court, Zulkefli Makinudin CJ (Malaya) (as he then was) said:

> [26] The basis of the plaintiff's complaint is that the deceased's NCR land had been amalgamated with other lands, subdivided and then, the subdivided lots which included the deceased's NCR land alienated to SEDC. The plaintiff was right in contending that the alienation of the land to SEDC was unlawful as no compensation was paid by the government under s 15 of the Land Code wherein the deceased or his estate suffered loss and damage. We are of the view that upon alienation of the land to SEDC the rights of the deceased to the land had been extinguished or he had been deprived of the land and his right to seek compensation against the government under s 197 of the Land Code accrued. His action however was barred by limitation as it was filed outside the period of limitation prescribed by s 202 of the Land Code. On this point we agree with the finding of the Court of Appeal that the plaintiff commenced his action in the High Court in April 1996, some 15 years from 1981 (the year the deceased's application for the land was rejected) or alternatively nine years from 1987 (the year the land was alienated to SEDC without extinguishment of the NCR). In either case the commencement of action by the plaintiff was time barred. We would therefore answer question (i) posed in this appeal in the affirmative.

[35] Apparent from the decisions in *Litus Jau* and *Husli bin Mok* that limitation applies to cases involving NCR, especially to cases where the claimants had slept over or had acquiesced to the infringement of their rights. Guided by the above decisions, we agreed with the learned judge that in the instant case, the plaintiffs' NCRs were extinguished on 13 June 1997 when Lot 2025 was alienated to the first defendant and that the limitation period starts from the said date. Alternatively, the cause of action accrued when the plaintiffs were dispossessed of the land claimed when the construction of Miri By-Pass Road began in 1997. By reason of Items 110 and 112, the plaintiffs' claim was time barred by 2009.

[36] The learned judge also held that the first and the second defendants have an indefeasible title to Lots 749, 786 and 788 pursuant to s 132(1) of the Land Code which reads:

> Subject to this Code, the registered proprietor of any estate or interest in land to which this section applies shall, except in the case of fraud, hold such estate or

A interest subject to the interests noted on the register but free from all other interest except ...

B **[37]** The learned judge found that no fraud was pleaded or raised by the plaintiffs. As such, the first and the second defendants' registered interest in Lots 749, 786 and 788 is indefeasible and is unencumbered, free of the plaintiffs' claim of alleged NCR. In this regard, the plaintiffs relied on *Madeli Salleh* to contend that there is no indefeasibility of title when the plaintiffs' NCR have never been specifically extinguished. With respect, we found the contention devoid of merit and reliance on *Madeli Salleh* misplaced as unlike
C the instant appeal, *Madeli Salleh* was not about alienation of land where document of title has been issued under the Land Code.

D **[38]** On the plaintiffs' contention that their claim was in respect of a continuing wrong and that by s 23 of the SLO, a fresh period of limitation shall begin to run at every moment of time during which the breach or wrong continues, we would respectfully endorse the decision of this court in *Litus Jau* that the answer lies in the conduct of the plaintiffs and that whatever injury that was caused to the plaintiffs was caused by a single act of the third defendant
E in issuing the provisional lease and/or the single act of the first and the second defendants in undertaking development projects on the said land.

F **[39]** In any event, the plaintiffs could not have been in possession of the said land given the massive developments/projects that had taken place thereon. The claim for nuisance and trespass, an injury to a possessory right could not therefore be sustained.

G **[40]** Learned counsel for the plaintiffs also submitted that in striking out the plaintiffs' claim, the learned judge was inconsistent in his ruling by not following his earlier decision in *Abdul Samad bin Mohd Embong & Ors v Pantai Bayu Indah Sdn Bhd & Ors* [2017] MLJU 2344 where His Lordship dismissed the defendants' applications to strike out the plaintiffs' claim.

H **[41]** Having perused the grounds of decision of the learned judge in *Abdul Samad*, we noted that the cases of *Litus Jau* and *Husli bin Mok* were not cited and relied upon by the learned judge. In our view, the learned judge could not be said to have erred in this instant case having relied on the decision of this court and the Federal Court in *Litus Jau* and *Husli bin Mok* respectively, in adherence to the doctrine of stare decisis. Quite apart from the above, there was
I no material before us to show whether the subject matter in *Abdul Samad* concerned the same parcel of land ie Lot 2025 which had been subdivided into Lots 749, 786 and 788.

[42] For completeness, we would refer to the case of *Racha Urud & Ors* relied

upon by the plaintiffs. In *Racha Ak Urud @ Peter Racha Urud & Ors v Ravenscourt Sdn Bhd & Ors* [2012] MLJU 96; [2012] 1 LNS 92, the High Court struck out the plaintiffs' action on the grounds that the action should have been commenced by judicial review and that the action was barred by limitation. On appeal to this court, the plaintiffs' appeal was allowed. The defendants obtained leave to appeal to the Federal Court. When the appeal came up before the Federal Court, the mode of commencement of the action was no longer an issue. And whilst the Federal Court did not specifically answer the question of law on limitation, it did allow the defendants' appeal, set aside the order of this court and affirmed the decision of the High Court in striking out the plaintiffs' action. It is perhaps useful to quote the following excerpts of the judgment of the Federal Court:

> [81] On the facts before us, we agree that the plaintiffs no longer possess, plant or maintain their NCR lands in their previous settlement where logging activities by the defendants have been carried out for almost 20 years before the commencement of the suit against the defendants. The uncontradicted evidence are inconsistent with 'occupation' as explained by this court in *Madeli bin Salleh*.
>
> [82] It is also inconceivable that the plaintiffs would not know of the presence of the defendants and their logging activities on the land for over a period of 26 years had they been in occupation of the land. At paras 33–34 of his grounds of judgment, the learned JC had admirably dealt with the issue which we find it unnecessary to repeat.
>
> [83] We agree that these are undisputed material facts which support the finding of loss of NCR over land in the previous settlement through non-user or abandonment having regard to the customary law and adat of the natives ... We affirm the finding of facts made by the learned JC.
>
> [84] The Court of Appeal had stated in its conclusion at para 27 of its judgment as follows:
>
> > OUR CONCLUSION
> >
> > [27] ... No claim should be struck out or dismissed or allowed on summary grounds under affidavit based procedures unless it is a plain and obvious case. This occurs only where the issue is purely a question of law or interpretation, and the facts based upon which the question of law or interpretation arose are not disputed. This is true also where the facts relevant to the question whether limitation applies are disputed. To deny any party the right to be heard in a court of justice to establish the facts and for a judgment made on the facts, is a denial of the fundamental elements of a fair and just decisions. Courts must therefore be slow to do so.
>
> [85] While it is right to state the law as such, the Court of Appeal had erred in concluding that 'there are issues of fact and of law that require a full appreciation of the facts in order to make a judicial decision that is fair and just according to law'. In other words, the Court of Appeal found that there are disputed material facts and/or insufficient facts that can justify the learned JC to conclude as he did.

A [86] It is trite that an appellate court should always be slow to disturb findings of fact made by a trial judge. More so where such findings of fact were never challenged by the parties. Further, it has not been demonstrated in what manner the learned JC had erred in coming to his finding that merits appellate intervention. The undisputed facts found by the learned JC as disclosed from the pleadings must be upheld.

B

[43] Likewise in our present case. In coming to his conclusion, the learned judge had made specific findings of fact based on the plaintiffs' pleading and affidavits. We found no compelling reason to disturb the findings of the learned C judge and we found no 'massive disputed facts' particularly on the knowledge of the plaintiffs of the various developments taking place on the said land between 1997–2006.

CONCLUSION

D

[44] Having regard to the relevant provisions in the SLO, the Land Code and the case laws, we were not persuaded that the learned judge was plainly wrong in his decision that this was a fit and proper case for him to exercise his discretion in striking out the plaintiffs' claim. In light of Items 72, 97, 110 and E 112 of the Schedule to the SLO, we agreed with the learned judge that the plaintiffs' claim is barred by limitation. As such, the plaintiffs' claim was obviously unsustainable. There being no reason for our appellate intervention, the appeals were accordingly dismissed with costs.

F *Appeals dismissed with costs.*

Reported by Ashok Kumar

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